IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

No. SD24630-2

JUANITA MARIE (GILMORE) CROW
Respondent - Petitioner

vs.

DWIGHT ALLEN GILMORE
Appellant-Respondent

APPEAL FROM THE CIRCUIT COURT OF
STONE COUNTY, MISSOURI

HONORABLE JUDGE WILLIAM T. KIRSCH

STONE COUNTY CIRCUIT COURT
CASE NO. CV592-326DR

BRIEF OF RESPONDENT, JUANITA MARIE (GILMORE) CROW

ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Respondent adopts the jurisdictional statement contained in Appellant=s Brief.

STATEMENT OF FACTS

Respondent adopts the Statement of Facts contained in Appellant=s Brief with the following exceptions and additions:

I. SUMMER VISITATION

Mother testified that when Father reduced his child support from $600.00 to $300.00 per month during his summer visitation with the children she Acould definitely not go back to court and fight it@. (Transcript, hereinafter ATR@ 16). Mother saw the children on alternate weekends during the five to six week visitation periods with Father during the summer. (TR 16). However, she did not see Justin on alternate weekends during the six week visitation with Father in the summer of 2000. (TR 16).

II. MOTHER=S INCOME

Mother testified that she was self-employed at J.D. Crow & Associates. (TR 99). The business is involved in the sale of bank equipment parts across the United States and internationally. (TR 102). Wife started the company. (TR 138). Although Mother=s current husband occasionally helped out with the business, Mother performed all aspects of running the business. (TR 102; 132). Prior to 1999, Mother=s current husband was employed full-time at O=Reilly Automotive at a salary of $36,000 to $40,000 per year. (TR 135; Respondent=s Exs. D and E). He had been employed at O=Reilly Automotive for eighteen years. (TR 103). In 1999, Mother performed all of the functions of the business including shipping, receiving, billing, book work, contacting customers and bringing in the inventory. (TR 103). However, because the business grew so much in 1999, it was necessary for Mother=s current husband to

come to work for the company. (TR 103; 135). After her current husband started working for the business in October of 1999, Mother=s job duties changed. (TR 103). The only duty she performed for the business after her current husband started working for the business in 1999 was to do the book work. (TR 103). In 2000, Mother was paid $8,546.00 from the company. (TR 100; Respondent=s Ex. 1).

III. PEOPLE=S BANK DEBT

Mother contacted Father prior to the closing on the sale of her house in June of 1994, and requested him to pay off the People=s Bank loan allocated to him pursuant to the dissolution decree. (TR 113). Father responded that Mother Agot enough@ and she should have had to pay it. (TR 113). The loan to People=s Bank in the amount of $5,138.97 was paid from the proceeds from the sale of Mother=s house at the closing in June of 1994. (Respondent=s Ex. 6). Since that time, Father never reimbursed Mother for her payment of this debt allocated to Father in the divorce decree. (TR 114).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN FINDING FATHER IN ARREARS ON HIS CHILD SUPPORT OBLIGATION TO MOTHER IN THE AMOUNT OF $2,400.00 AND IN AWARDING HER A JUDGMENT IN THAT AMOUNT BECAUSE FATHER FAILED TO PROVE THAT HE WAS ENTITLED TO AN ABATEMENT OF CHILD SUPPORT PURSUANT TO SECTION 452.340.2 RSMo. IN THAT MOTHER DID NOT VOLUNTARILY RELINQUISH PHYSICAL CUSTODY OF THE CHILDREN TO FATHER FOR MORE THAN THIRTY CONSECUTIVE DAYS AND EVEN IF SHE DID FATHER IS ONLY ENTITLED TO AN ABATEMENT FOR SUCH PERIOD OF TIMES IN EXCESS OF THIRTY DAYS PURSUANT TO THIS STATUTE.

Section 452.340.2 RSMo.

Error! No table of authorities entries found.

II. THE TRIAL COURT DID NOT ERR IN INCREASING FATHER=S CHILD SUPPORT OBLIGATION TO $675.00 PER MONTH BECAUSE SAID ORDER WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT AN ABUSE OF THE TRIAL COURT=S DISCRETION IN THAT THE INCLUSION OF EMPLOYER CONTRIBUTIONS TO FATHER=S 401K IN HIS GROSS INCOME WAS NOT MATERIAL ERROR AND THE TRIAL COURT=S FORM 14 CALCULATION UTILIZED THE ACTUAL INCOME RECEIVED BY MOTHER BASED ON THE MOST RECENT INFORMATION AND THERE WAS NO EVIDENCE THAT MOTHER

DELIBERATELY REDUCED HER INCOME TO AVOID HER FINANCIAL RESPONSIBILITY TOWARD HER CHILDREN.

Error! No table of authorities entries found.

III. THE TRIAL COURT DID NOT ERR IN FINDING FATHER IN CONTEMPT FOR FAILING TO PAY THE PEOPLE=S BANK DEBT BECAUSE SAID FINDING WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT AN ABUSE OF THE TRIAL COURT=S DISCRETION IN THAT MOTHER PAID THIS OBLIGATION WHICH WAS ALLOCATED TO FATHER IN THE DIVORCE DECREE AND FATHER NEVER REIMBURSED MOTHER FOR THIS PAYMENT, AND AS A RESULT, FATHER RECEIVED A WINDFALL.

Error! No table of authorities entries found.

IV. THE TRIAL COURT DID NOT ERR IN AWARDING MOTHER $2,980.00 IN ATTORNEY FEES BECAUSE SAID JUDGMENT WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT AN ABUSE OF THE TRIAL COURT=S DISCRETION IN THAT THE COURT WAS VESTED WITH BROAD DISCRETION IN DETERMINING WHETHER TO AWARD ATTORNEY FEES, FATHER=S INCOME EXCEEDED THAT OF MOTHER, AND FATHER WAS FOUND TO BE IN CONTEMPT.

Error! No table of authorities entries found.

ARGUMENT

POINT RELIED ON I.

THE TRIAL COURT DID NOT ERR IN FINDING FATHER IN ARREARS ON HIS CHILD SUPPORT OBLIGATION TO MOTHER IN THE AMOUNT OF $2,400.00 AND IN AWARDING HER A JUDGMENT IN THAT AMOUNT BECAUSE FATHER FAILED TO PROVE THAT HE WAS ENTITLED TO AN ABATEMENT OF CHILD SUPPORT PURSUANT TO SECTION 452.340.2 RSMo. IN THAT MOTHER DID NOT VOLUNTARILY RELINQUISH PHYSICAL CUSTODY OF THE CHILDREN TO FATHER FOR MORE THAN THIRTY CONSECUTIVE DAYS AND EVEN IF SHE DID FATHER IS ONLY ENTITLED TO AN ABATEMENT FOR SUCH PERIOD OF TIMES IN EXCESS OF THIRTY DAYS PURSUANT TO THIS STATUTE.

Concise statement of applicable standard of review.

On review of court tried matters, the judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or misapplies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc. 1976). This Court is to give deference to the trial court=s opportunity to observe the witnesses, assess their credibility and weigh their sincerity. *Pinnell v. Jacobs*, 873 S.W.2d 925, 927 (Mo. App. 1994). This judgment must be affirmed if it is correct under any reasonable theory

pleaded and supported by the evidence. *Mitchell v. Mitchell*, 888 S.W.2d 393, 396 (Mo. App. 1994).

As set forth in Respondent=s motion to dismiss, filed contemporaneously herewith, Appellant=s appeal from the contempt order is premature for the reason that the court=s contempt order has not been enforced by actual incarceration pursuant to a warrant of commitment, and therefore is not a final judgment. *Torrence v. Torrence*, 774 S.W.2d 880 (Mo. App. E.D. 1989). Since Appellant=s Point I deals exclusively with the contempt order, which is not yet a final judgment, this Point should be dismissed.

In its Judgment and Modification of Contempt the trial court found Father in contempt of the Judgment and Decree of Dissolution of Marriage for failing to pay child support in the amount of $2,400.00. (L.F. 52). At trial, Mother testified that this arrearage was caused by Father=s reduction of his $600.00 monthly child support payments by $300.00 for each of the eight summers immediately preceding the trial. (TR 115-116). The Judgment and Decree of Dissolution of Marriage did not grant any specific summer visitation to Father. (L.F. 9). However, Mother permitted the parties= minor children to have summer visitation with Father for five or six weeks beginning in the summer of 1993, and continuing each summer through the summer of 2000. (TR 80). During these summer visitations with Father, Mother had visits with the children every other weekend. (TR 15-16). While Father testified that Mother had agreed that he could reduce his child support to $300.00 per month for one month during each of the eight summers preceding trial, Mother denied they had made such an agreement. (TR

116). When questioned about Father=s reduction of his child support payment to $300.00 per month, Mother testified:

> I believe what actually happened was he said he felt it was only fair since he had the kids six weeks that he should only have to pay half of it. At the time that that occurred, I could definitely not go back to court and fight it, so all I could do was accept it, which is - - I feel like most of the time the best thing to do is just not to - - to have disagreements over these things because it comes back on the kids. So I did not do anything about it at that time. I just went ahead and took it. (TR 116).

In holding Father in contempt for failure to pay child support in the amount of $2,400.00, the trial court implicitly found that there was no agreement between the parties to reduce child support and that Father was not entitled to an abatement of child support pursuant to Section 452.340.2 RSMo. This Section provides in part that:

> The obligation of the parent ordered to make support payments shall abate, in whole or in part, for such periods of time in excess of thirty consecutive days that the other parent has voluntarily relinquished physical custody of a child to the parent ordered to pay child support, notwithstanding any periods of visitation or temporary physical or legal custody pursuant to a judgment of dissolution of legal separation or any modification thereof.

The party seeking an abatement pursuant to Section 452.340.2 RSMo. has the burden of proof on that issue. *Harris v. Rattini*, 855 S.W.2d 410, 412 (Mo. App. E.D. 1993).

Mother submits that Father was not entitled to an abatement pursuant to this Section for several reasons. First, Mother did not voluntarily relinquish physical custody of the children to Father. Mother simply permitted the children to have summer visitation with Father for five or six weeks. Mother was not giving up custody of the children to Father. In interpreting this statute, Missouri courts have not elaborated on the meaning of the term Arelinquish@ in the statute. The use of the word Arelinquish@ in the statute indicates some permanent abandonment of custodial rights. Black=s Law Dictionary defines Arelinquish@ as Ato abandon, to give up, to surrender, to renounce some right or thing.@ Rev. 4th Ed. (1968). The term Aabandon@ is defined as Ato desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one=s right or interest.@ Black=s Law Dictionary, Rev. 4th Ed. (1968).

Mother submits that the use of the term Arelinquish@ in the statute contemplates some permanent or final abandonment of custodial rights, as opposed to a temporary grant of additional visitation periods. There was no contention at trial that Mother was giving up custody of the children by allowing summer visitation with Father.

Furthermore, in order to be entitled to an abatement of child support under the statute, there must be a voluntary relinquishment of physical custody in excess of Athirty consecutive days@. It is undisputed in this case that Mother had visitation with the children on alternate weekends during the children=s five or six week summer visitation with Father. (TR 15-16).

Thus, there could not have been a relinquishment of custody for Athirty consecutive days@ as required by the statute.

Finally, even if the Court finds that Mother voluntarily relinquished physical custody of the children for thirty consecutive days, the statute provides that Father=s child support payments abate Afor such periods of time *in excess* of thirty consecutive days@. (Emphasis added). Thus, Father would not be entitled to an abatement for the first thirty days, and would only be entitled to an abatement for child support for periods of time in excess of thirty days. There was no testimony at trial about the exact number of days Father had visitation with the children during each of the summers following the entry of the divorce decree. The only testimony at trial concerning the duration of Father=s summer visitation with the children was that it was a five or six week period. (TR 23). Thus, even if Father was entitled to an abatement pursuant to this statute, it would only be for a period of five to twelve days, depending upon the exact duration of the summer visitation. Since the burden of proof was on Father to show he was entitled to an abatement, and there was no testimony about the exact duration of each summer visitation, Father failed to meet his burden of proof.

Lastly, Father argues that Mother should be estopped from collecting these child support arrearages as a result of her failure to pursue collection for eight years. In support of this position, Father relies on *Grommet v. Grommet*, 714 S.W.2d 747 (Mo. App. E.D. 1986). However, in *Grommet*, the Eastern District Court of Appeals held that the doctrine of waiver by acquiescence did not apply and reversed the trial court=s decision. In discussing the doctrine of waiver by acquiescence the court noted that Aapplication of the doctrine has been restricted

to cases wherein circumstances over and beyond a mere express or implied agreement to accept reduced payments or a delay in demanding full payment exist.@ *Id* at 751. Further, the court held that the doctrine did not apply unless there was Asome fact or circumstance which warrants the invocation of equitable considerations in order to avoid injustice.@ *Id.* The court held that there must be some indicia of injustice such as a change in respondent=s position induced by a misconception of the appellant=s intent. *Id.* In holding that the doctrine did not apply under the facts of the case, the court in *Grommet* noted that Athe agreement found to exist by the trial court consisted of appellant=s acceptance of what respondent said he would do. It was not a negotiated agreement in which both parties gave something of value; respondent gave nothing.@ *Id.* Finally, the court held that the obligor had sought to invoke equitable principles not to protect himself from injustice, but to retain an undeserved windfall, and under those circumstances, the application of the doctrine of waiver by acquiescence was not appropriate. *Id.*

As was the case in *Grommet*, there was no agreement between the parties in this case for Father to reduce his child support payments. Father simply told Mother what he thought was fair and Mother had no choice but to accept it. (TR 116). It would not have been economically feasible for Mother to file a Motion for Contempt against Father when all that was at stake was $300.00. Furthermore, there was no showing by Father of any change in his position or injustice sufficient to invoke equitable principles. Father should not be permitted to invoke the doctrine of waiver by acquiescence in order to retain an undeserved windfall. For all of

these reasons, the trial court did not err in finding that Father owed child support arrearages in the amount of $2,400.00.

POINT RELIED ON II.

THE TRIAL COURT DID NOT ERR IN INCREASING FATHER=S CHILD SUPPORT OBLIGATION TO $675.00 PER MONTH BECAUSE SAID ORDER WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT AN ABUSE OF THE TRIAL COURT=S DISCRETION IN THAT THE INCLUSION OF EMPLOYER CONTRIBUTIONS TO FATHER=S 401K IN HIS GROSS INCOME WAS NOT MATERIAL ERROR AND THE TRIAL COURT=S FORM 14 CALCULATION UTILIZED THE ACTUAL INCOME RECEIVED BY MOTHER BASED ON THE MOST RECENT INFORMATION AND THERE WAS NO EVIDENCE THAT MOTHER DELIBERATELY REDUCED HER INCOME TO AVOID HER FINANCIAL RESPONSIBILITY TOWARD HER CHILDREN.

Concise statement of applicable standard of review.

A child support provision will be upheld unless the trial court abused its discretion or erroneously applied the law. *In Re Marriage of Gerhard*, 985 S.W.2d 927, 930 (Mo. App. S.D. 1999). The trial court=s award of child support will not be disturbed on appeal unless the evidence is Apalpably insufficient@ to support it. *Id.* An abuse of discretion will be found only where the trial court=s ruling is clearly against the logic of the circumstances or is arbitrary or unreasonable. *Id.*

Mother agrees that Father=s employer=s contributions to his 401K should not have been included in his gross income in the Form 14 calculation. Mother agrees that Father=s correct average gross monthly income should have been $4,013.00 per month as submitted by Father

in his Brief. (Appellant=s Brief 31). If Father=s gross income is changed to $4,013.00 in the Form 14 utilized by the trial court, the presumed child support amount is $646.00 per month instead of $675.00 per month. (See Ex. 1 attached hereto). This amounts to a difference of $29.00 per month. Mother submits that this Court can amend the trial court=s judgment as to child support and enter judgment for $646.00 per month. Supreme Court Rule 84.14.

Father also argues that the trial court erred in failing to impute income to Mother. In support of this argument, Father states that the trial court should have based Mother=s income on her 1999 earnings instead of her earnings in the thirteen months prior to trial. Mother testified that she was self-employed at J.D. Crow & Associates. (TR 99). In 1999, this business reported net income of $37,354.00. (Respondent=s Ex. D). However, Mother explained that this income was actually overstated in light of the fact that the business accumulated an additional $10,000.00 in inventory during the year. (TR 127-131; Respondent=s Ex. D). The inventory at the beginning of the year in 1999 was $30,610.00 and the inventory at the end of year was $40,221.00. (Respondent=s Ex. D). If the inventory had stayed the same in 1999 then the cost of goods sold for tax purposes would have been $162,155.00. ($192,765 minus $30,610 equals $162,155; Respondent=s Ex. D). However, as a result of the buildup in inventory, the cost of goods sold was $152,544.00, resulting in a difference of $9,611.00. Thus, if there had been no change in inventory in 1999, the net income from the business only would have been $27,743.00. ($37,354 minus $9,611 equals $27,743; Respondent=s Ex. D). Mother explained that even though she had not sold the

additional inventory during the year, she was required to pay taxes on the inventory. (TR 127-131).

Prior to 1999, Mother=s current husband was employed full-time at O=Reilly Automotive at a salary of $36,000 to $40,000 per year. (TR 135; Respondent=s Exs. D and E). Mother=s current husband had been employed at O=Reilly Automotive for eighteen years. (TR 103). Mother started the business of J.D. Crow & Associates and performed all aspects of running the business. (TR 102). In 1999, she performed all of the functions of the business including shipping, receiving, billing, book work, contacting customers, and bringing in the inventory. (TR 103). However, because the business grew so much in 1999, it was necessary for Mother=s current husband to come to work for the company. (TR 103; 135). Mother testified that Awe got to the point where we had grown so much that I was going to have to hire help of some kind.@ (TR 135). After her current husband started working for the business in October of 1999, Mother=s job duties changed. (TR 103). The only duty she performed for the business after her current husband started working for the business in 1999 was to do the book work. (TR 103). In 2000, Mother was only paid $8,546.00 from the company. (TR 100; Respondent=s Ex. 1). Mother testified that her average monthly income at the time of trial was $800.00 per month. (TR 101). There was no evidence presented at trial as to the amount of income the company paid Mother=s current husband in 2000, nor was there any evidence presented as to the company=s income for 2000. The trial court utilized $800.00 as Mother=s gross monthly income in its Form 14 calculation. (L.F. 59). This was based upon Mother=s actual average earnings during the thirteen months prior to trial. There was absolutely

no evidence presented that Mother intentionally reduced her income in order to avoid responsibility toward her children. Father=s motion to modify was filed August 28, 2000. (L.F. 3). Mother=s current husband left his job at O=Reilly Automotive in October of 1999, almost one year prior to the filing of Father=s motion to modify. Mother testified that her household lost the $36,000 to $40,000 per year income her current husband had been receiving from O=Reilly Automotive when he came to work for the business. (TR 135). Since her current husband took over almost all of the duties of running the business, it would certainly not be unreasonable for him to receive a higher salary than Mother (although there was no evidence presented at trial as to the amount of his salary). Furthermore, it is not unreasonable to expect Mother=s income to decrease in light of the fact that the company was paying a salary to two employees instead of one. Based on these facts, the trial court did not err in failing to impute income to Mother.

What constitutes appropriate circumstances to impute income will depend on the facts and must be determined on a case by case basis. *Pelch v. Schupp*, 991 S.W.2d 729, 734 (Mo. App. W.D. 1999). The cases involving issues of imputation of income necessarily require the exercise of the sound discretion of the trial court and cannot be considered a mechanical process. *Id.*

Proof that a parent has previously made more money is not alone a sufficient basis upon which to impute income at those levels. *Jones v. Jones*, 958 S.W.2d 607, 612 (Mo. App. W.D. 1998). The trial court may, in its discretion, look at a single year=s income figures if the court finds those figures to be the most accurate predictor of the parent=s income. *Glueck v. Tanner*,

913 S.W.2d 951, 956 (Mo. App. E.D. 1996). In *Ricklefs v. Ricklefs*, the father claimed the trial court had misapplied the law in calculating his income for child support purposes because the trial court used only his last year=s salary as opposed to an average of his past three year=s salary. 39 S.W.3d 865 (Mo. App. W.D. 2001). However, the court held that Aa trial court, in determining the amount of income to impute to a party in its Form 14 PCSA calculation, is not required in every instance to average the party=s prior three years of income. In determining probable earnings, the court may rely on any time period as may be appropriate under the circumstances.@ *Id.* at 875. Furthermore, the court added that the trial court could, upon the proper exercise of its discretion, Aignore [father=s] income history and look at his income from a single year, if it found that amount to be an accurate predictor of his income.@ *Id.* at 876.

Thus, in the present case, the trial court was not required to average Mother=s income for the last several years, or to utilize the highest amount of income ever earned by Mother, as proposed by Father in his brief. The evidence that the business was required to support two full-time employees instead of one was sufficient to justify the reduction in Mother=s income. The trial court heard the evidence and properly exercised its discretion in determining what evidence it found most credible. Missouri law has held that the trial court=s determination as to the issues of credibility of witnesses= testimony are for the trial court and the reviewing court will not substitute its judgment for that of the trial court on such issues. *Dukes v. Dukes*, 859 S.W.2d 264 (Mo. App. S.D. 1993).

For these reasons, Mother submits that the trial court did not err in utilizing the sum of $800.00 per month as her gross income in its Form 14 calculation. If this Court does find that

the error in including Father=s employer=s contributions to his 401K in his gross income is material, then Mother would request this Court to adopt the Form 14 attached hereto as Exhibit 1 and amend the child support order to $646.00 per month.

POINT RELIED ON III.

THE TRIAL COURT DID NOT ERR IN FINDING FATHER IN CONTEMPT FOR FAILING TO PAY THE PEOPLE=S BANK DEBT BECAUSE SAID FINDING WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT AN ABUSE OF THE TRIAL COURT=S DISCRETION IN THAT MOTHER PAID THIS OBLIGATION WHICH WAS ALLOCATED TO FATHER IN THE DIVORCE DECREE AND FATHER NEVER REIMBURSED MOTHER FOR THIS PAYMENT, AND AS A RESULT FATHER RECEIVED A WINDFALL.

Concise statement of applicable standard of review.

Generally, in civil contempt cases, the trial court=s ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. *International Motor Company, Inc. v. Boghosian Motor Company, Inc.*, 870 S.W.2d 843, 847 (Mo. App. E.D. 1993). On review of court tried matters, the judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or misapplies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc. 1976). This Court is to give deference to the trial court=s opportunity to observe the witnesses, assess their credibility and weigh their sincerity. *Pinnell v. Jacobs*, 873 S.W.2d 925, 927 (Mo. App. 1994). This judgment must be affirmed if it is correct under any reasonable theory pleaded and supported by the evidence. *Mitchell v. Mitchell*, 888 S.W.2d 393, 396 (Mo. App. 1994).

As set forth in Respondent=s motion to dismiss, filed contemporaneously herewith, Appellant=s appeal from the contempt order is premature for the reason that the court=s

contempt order has not been enforced by actual incarceration pursuant to a warrant of commitment, and therefore is not a final judgment. *Torrence v. Torrence*, 774 S.W.2d 880 (Mo. App. E.D. 1989). Since Appellant=s Point III deals exclusively with the contempt order, which is not yet a final judgment, this Point should be dismissed.

Notwithstanding the lack of finality of the contempt judgment, Respondent submits that the trial court did not err in holding Father in contempt for failing to pay the People=s Bank debt. Pursuant to the Judgment and Decree of Dissolution of Marriage, Father was ordered to pay the debt to People=s Bank in the amount of $7,745.46. (L.F. 13). This debt was a second mortgage secured by the marital residence which was awarded to Mother in the divorce. (L.F. 11; 13). When Mother sold this property on June 20, 1994, after the divorce, the People=s Bank debt was paid off from the sale proceeds. (TR 112; Respondent=s Ex. 6). The amount of the pay off on the People=s Bank loan at that time was $5,138.97. (Respondent=s Ex. 6). Mother contacted Father prior to the closing in June of 1994 and requested him to pay off the loan. (TR 113). Father responded that Mother Agot enough@ and she should have to pay it. (TR 113). Since that time, Father never reimbursed Mother for her payment of $5,138.97 on the People=s Bank debt allocated to Father in the divorce decree. (TR 114).

Missouri courts have previously held that a spouse may be held in contempt for failure to make mortgage payments pursuant to the property provisions of a divorce decree. *Yeager v. Yeager*, 622 S.W.2d 339 (Mo. App. E.D. 1981); *Huber v. Huber*, 649 S.W.2d 955 (Mo. App. E.D. 1983). In his brief, Father does not contest the authority of the Court to enter an order of contempt against him for failing to pay the People=s Bank debt. Neither does he claim as

a defense that he did not have the ability to pay the debt. Instead, Father argues that Mother waived her right to seek reimbursement of her payment of the debt and that she should be estopped from seeking reimbursement for her payment of said debt.

Mother would first point out that both waiver and estoppel are affirmative defenses required to be specifically pled pursuant to Rule 55.08. In his answer to Mother=s motion for contempt, Father did not plead either waiver or estoppel as an affirmative defense. (L.F. 42-43). Failure to plead in an affirmative defense results in the waiver of that defense. *Vaughn v. Willard*, 37 S.W.3d 413, 416 (Mo. App. S.D. 2001). Since Father failed to plead the affirmative defenses of waiver or estoppel, he has waived them and he cannot raise them for the first time on appeal.

Furthermore, the defenses of waiver and estoppel were not supported by the evidence. Estoppels are not favorites of the law and will not be invoked lightly. *Investors Title Company v. Chicago Title Insurance*, 983 S.W.2d 533, 537 (Mo. App. E.D. 1998). To prevail on an estoppel theory, the party asserting estoppel bears the burden of establishing by clear and satisfactory evidence every fact essential to create an estoppel. *Id.* To support a claim for equitable estoppel there must be (1) an admission, statement or act inconsistent with a claim afterwards asserted and sued upon; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *American National Insurance Company v. Noble Communications Company*, 936 S.W.2d 124, 132 (Mo. App. S.D. 1996).

In the present case, there was no statement or admission by Mother that would give rise to an estoppel defense. Prior to selling the house, Mother demanded Father to pay the People=s Bank loan. (TR 113; 26). She never told Father not to worry about the debt or that she would pay it. (TR 114). She did not make any statement to him to relieve him of the obligation for the debt. (TR 114). Even Father admitted at trial that Mother asked him to pay off the loan prior to the closing. (TR 26). This demand by Mother is not inconsistent with her later claim for contempt against Father for failing to reimburse her for paying the People=s Bank debt.

Father=s sole basis for his estoppel defense is the failure of Mother to pursue this claim for six years. Inaction is not sufficient to support a claim for equitable estoppel absent an obligation or duty to speak. *UAW-CIO Local No. 31 Credit Union v. Royal Insurance Co., Ltd.,* 594 S.W.2d 276, 283 (Mo. banc 1980). Furthermore, Father must show that he was somehow prejudiced as a result of his reliance on Mother=s inaction. He has failed to do so. In his brief, Father claims the trial court=s award of interest to Mother on this claim constitutes sufficient injury to support his equitable estoppel defense. This argument ignores the fact that Father clearly received a benefit as a result of Mother=s payment of this obligation. Since Mother paid $5,138.97 that Father was supposed to pay under the divorce decree, Father received a benefit of $5,138.97. This is additional money that he had in his pocket as a result of Mother=s payment of this debt. He had the use and benefit of an additional $5,138.97 that he would not have otherwise had if Mother had not paid off the loan. This benefit can be measured by the amount of interest that the court awarded to Mother. Thus, Father was not injured or otherwise prejudiced as a result of Mother=s failure to pursue this claim for six years.

Likewise, Father=s defense of waiver is not supported by the evidence. A waiver is the intentional relinquishment of a known right. *Investors Title Company*, 983 S.W.2d at 538. To rise to the level of waiver, the conduct must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible. *Id.* Prior to the closing, Mother demanded that Father pay off the loan. She never told him not to worry about it that she would pay it off. Her inaction does not rise to the level of waiver.

Father claims that it was not equitable for the court to order him to reimburse Mother for her payment of the People=s Bank debt. Mother submits, however, that it would be inequitable for the court *not* to have ordered Father to reimburse her for the payment of this debt. It is undisputed that the $5,138.97 payment to the People=s Bank was Father=s responsibility. Father received a substantial benefit by virtue of Mother=s payment of this debt. Father would receive a windfall if he were not required to reimburse Mother for her payment of this debt. Father has not been prejudiced by Mother=s payment of this debt. On the contrary, he has benefitted from it.

Lastly, Father contends that the trial court did not have authority to award interest at the rate of nine percent on the People=s Bank debt. Father argues that since the judgment only required him to assume the People=s Bank debt, it did not constitute a judgment and order for money which would give rise to post-judgment interest pursuant to Section 408.040.1 RSMo.

Even though there was not actually a money judgment entered against Father in the dissolution decree, the decree did order Father to pay a specific sum of money to People=s Bank. This should not be treated any differently than a case in which there was a money judgment against Father. Father received a financial benefit due to the fact that he was not required to make any more payments to People=s Bank after Mother paid off the debt. Father had an additional $5,138.97 that he would not have had had Mother not paid off the debt. The use of this money was a financial benefit to Father and can be measured in the form of interest.

On the other hand, Mother lost the use and benefit of $5,138.97 that she would have had if she had not been required to pay off this loan. If Father would have paid off the People=s Bank loan as ordered by the divorce court, Mother would have had the use and benefit of an additional $5,138.97. She could have invested these funds and earned some return on them. In short, Father enjoyed the use and benefit of this money and Mother was deprived of the use and benefit of this money. The theory of interest in any case is compensation for the use of or loss of the use of money to the person entitled to it. *Laughlin v. Boatmen=s National Bank of St. Louis*, 189 S.W.2d 974, 979 (Mo. 1945). In *Laughlin*, the Supreme Court also held that Ait is almost an axiom in American jurisprudence that he who has the use of another=s money, or money he ought to pay, should pay interest on it.@ *Id.*

Even if it was not proper for the court to award interest pursuant to Section 408.040.1 RSMo., the court has the authority to assess a fine as punishment in civil contempt. See, e.g., *In Re Marriage of Hunt*, 933 S.W.2d 437, 448 (Mo. App. S.D. 1996). This Court has previously held that the trial court has discretion in issuing and fashioning contempt orders and as a result,

fines for civil contempt need not be limited to per diem fines that expire upon compliance with the order, but may be compensatory. *Id.* at 448-449. The only requirement is that the fines for civil contempt must be related to the actual damage suffered by the injured party. *Id.* at 449.

Although the interest the trial court awarded to Mother for the payment of the People=s Bank debt was not expressly labeled a fine, it certainly can be considered as such. The interest was awarded to Mother to compensate her for the loss of the use of the money, and therefore, was compensatory. If Mother would not have been required to pay off the People=s Bank debt, she would have had an additional $5,138.97 to invest or otherwise earn some rate of return on. The court=s award of interest to Mother on this amount was related to the actual damage she sustained as a result of Father=s failure to pay the debt.

The court in *In re Estate of Zimmerman*, 820 S.W.2d 617, 620 (Mo. App. E.D. 1991) held that a $100.00 per day fine in the context of a refusal to comply with an order to repay more than $14,000.00 was proper. In so holding, the Eastern District held that Aa per diem fine is a proper method of coercing compliance with a court order regardless of whether it also serves a reimbursement or punishment function.@ *Id.*

An award of interest is not any different than a per diem fine. It serves to compensate Mother for her loss of use of the money. If a court cannot award interest under circumstances such as these, then there is no incentive for spouses in Father=s position to comply with the orders contained in a dissolution decree in a timely manner. A holding that interest cannot be awarded to a spouse who pays a debt allocated to the other spouse in a dissolution would set

a bad precedent and would send a message to spouses that there is no penalty for failure to comply with the court=s order.

Since the court=s award of interest was compensatory and was related to the actual damages suffered by Mother as a result of the loss of use of money, the trial court=s award of interest should be affirmed.

POINT RELIED ON IV.

THE TRIAL COURT DID NOT ERR IN AWARDING MOTHER $2,980.00 IN ATTORNEY FEES BECAUSE SAID JUDGMENT WAS BASED ON SUBSTANTIAL EVIDENCE AND WAS NOT AN ABUSE OF THE TRIAL COURT=S DISCRETION IN THAT THE COURT WAS VESTED WITH BROAD DISCRETION IN DETERMINING WHETHER TO AWARD ATTORNEY FEES, FATHER=S INCOME EXCEEDED THAT OF MOTHER, AND FATHER WAS FOUND TO BE IN CONTEMPT.

Concise statement of applicable standard of review.

On review of court tried matters, the judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or misapplies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc. 1976). This Court is to give deference to the trial court=s opportunity to observe the witnesses, assess their credibility and weigh their sincerity. *Pinnell v. Jacobs*, 873 S.W.2d 925, 927 (Mo. App. 1994). This judgment must be affirmed if it is correct under any reasonable theory pleaded and supported by the evidence. *Mitchell v. Mitchell*, 888 S.W.2d 393, 396 (Mo. App. 1994).

As a general rule, the parties to a dissolution are to pay their attorney=s fees. *Rich v. Rich*, 871 S.W.2d 618, 627 (Mo. App. 1994). Section 452.355.1 RSMo. permits a trial court to award attorney=s fees in a modification action. Two factors for consideration under this section are the actions of the parties during the pendency of the action and the parties= financial

situation. The court has broad discretion in ordering or refusing to order attorney fees, and its ruling will be disturbed on appeal only upon a showing of abuse of discretion. *Cohn v. Cohn*, 841 S.W.2d 782, 787 (Mo. App. 1992). To show an abuse of discretion by the trial court, the complaining party has the burden to show that the award of attorney fees is Aclearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one=s sense of justice and to indicate a lack of deliberation.@ *Ederle v. Ederle*, 741 S.W.2d 883, 885 (Mo. App. 1987).

Furthermore, in a contempt case, the court need not be limited with the provisions of Section 455.355 RSMo. in awarding attorney fees. *Saab v. Saab*, 637 S.W.2d 790, 792 (Mo. App. E.D. 1982). The court has authority to award reasonable attorney fees in a civil contempt proceeding. *Id.* at 792-793.

In entering its award of attorney fees to Mother, the court found that Father should pay her reasonable attorney fees Adue to his contempt and in consideration that he makes substantially more income than the Petitioner does.@ (L.F. 51). This finding was supported by the evidence. Father by his own testimony, makes almost $50,000.00 per year, while Mother was only making an average of $800.00 per month in the thirteen months prior to trial. (TR 29; 101). Furthermore, Mother was required to incur attorney fees in order to force Father to pay amounts he was previously ordered to pay pursuant to the divorce decree. The court has authority to assess attorney fees in civil contempt cases for willful disobedience of a court order. *McNeill v. McNeill*, 708 S.W.2d 751 (Mo. App. E.D. 1986). In *McNeill*, the Eastern District Court of Appeals held that the trial court did not abuse its discretion in awarding

attorney fees to the wife when husband was found to have willfully violated a decree of the court. *Id.*

In the present case, Mother was required to defend a motion to modify custody upon which she prevailed. She incurred attorney fees in prosecuting her motion for contempt upon which she prevailed. Furthermore, it was undisputed that Father=s monthly income exceeded Mother=s monthly income. Based upon these factors, the trial court did not err in awarding Mother attorney fees. Under these circumstances, the award certainly cannot be said to be clearly against the logic of the circumstances or so arbitrary and unreasonable as to shock one=s sense of justice and to indicate a lack of deliberation, as it is required to show an abuse of discretion by the trial court. Therefore, the trial court=s decision pertaining to attorney fees should be affirmed.

CONCLUSION

For the reasons stated above, Mother respectfully requests this Court to affirm the trial court=s decision with respect to Father=s current child support obligation, to dismiss Points I, III and IV of Appellant=s Brief due to lack of finality of the contempt order.

ORAL ARGUMENT REQUESTED

Notice is hereby given that Respondent respectfully requests an oral argument in this cause.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

COMES NOW Randy J. Reichard, of LOWTHER JOHNSON Attorneys at Law, LLC, of lawful age and having been duly sworn, states that this Brief complies with the limitations contained in Supreme Court Rule 84.06(c).

I further state that the number of words contained in this Brief are 7,116, and that this Brief was prepared with and formatted in WordPerfect 8.0.

I further state that a floppy disk containing the Brief is being filed herewith, and said disk is double-sided, high density, IBM-PC compatible, 1.44 MB 3 **2** inch size and said disk has been scanned by Norton AntiVirus Corporate Edition for viruses and is virus free.

STATE OF MISSOURI '
' ss.
COUNTY OF GREENE '

Randy J. Reichard, being of lawful age and being first duly sworn upon his oath, states that he is the attorney and agent above named, and the facts and matters as stated above are true according to his best information, knowledge and belief.

_____
Randy J. Reichard

Subscribed to before me this 1st day of July, 2002.

_____
Linda McNabb, Notary Public

My Commission Expires:

CERTIFICATE OF SERVICE

COMES NOW Randy J. Reichard, of LOWTHER JOHNSON Attorneys at Law, LLC, of lawful age and having been duly sworn, states that Brief of Respondent, Juanita Marie (Gilmore) Crow in the within cause was by him hand-delivered or mailed, postage prepaid, by United States Mail, to the following named persons at the addresses shown, all on the 1st day of July, 2002.

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STATE OF MISSOURI '
' ss.
COUNTY OF GREENE '

Randy J. Reichard, being of lawful age and being first duly sworn upon his oath, states that he is the attorney and agent above named, and the facts and matters as stated above are true according to his best information, knowledge and belief.

Randy J. Reichard

Subscribed to before me this 1st day of July, 2002.

Linda McNabb, Notary Public

My Commission Expires:

APPENDIX